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No. 06-1278

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IN THE

Supreme Court of the United States

MARTIN A. ARMSTRONG,

Petitioner,

v.

JOSEPH R. GUCCIONE, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK; MARVIN D. MORRISON, WARDEN, METROPOLITAN CORRECTIONAL CENTER; and ALAN M. COHEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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I. The Recalcitrant Witness Statute Applies To Corporate Custodians Who Refuse To Produce Incriminating Evidence Against Themselves.

Respondents are simply wrong in claiming that the Recalcitrant Witness Statute is inapplicable "to corporate custodians who refuse to return property belonging to their corporations." Opp. 8. As explained in the Petition, Section 1826's application to custodians is demonstrated by *Braswell v. United States*, 487 U.S. 99 (1988), this Court's landmark decision on the corporate custodian doctrine, *which was itself a Section 1826 case*. Pet. 12. After *Braswell*, the circuits also have applied Section 1826 to corporate custodians. *See, e.g., In re Grand Jury Subpoena Dated Nov. 12, 1991*, 957 F.2d 807 (11th Cir. 1992) (per curiam). Respondents' assertion cannot be correct because it would lead to the absurd result that corporate officers could be held forever while all other witnesses would have to be released after eighteen months.[1]

Respondents also mistakenly believe that then-Justice Rehnquist's dissenting opinion in *Gelbard v. United States*, 408 U.S. 41, 73 (1972) (Rehnquist, J., dissenting), a case that did not even involve corporate custodians, helps their contention that Section 1826 does not apply to corporate custodians. Opp. 8. In fact, Justice Rehnquist's dissent in *Gelbard* provides persuasive reasoning why corporate custodians *are* protected by the Recalcitrant Witness Statute. Noting that Congress enacted Section 1826 to "codify present [civil contempt] practice" in federal courts, 408 U.S. at 73, 75 (quoting S. Rep. No. 91-617, at 148 (1969)), Justice Rehnquist reasoned that contempt practices that existed prior to Section 1826's enactment are instructive in identifying classes of contemnors to whom

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1. The District Court (that heard Armstrong's habeas petition) acknowledged, and Respondents effectively concede, that Armstrong was a "witness" under the Recalcitrant Witness Statute, and the Second Circuit did not hold to the contrary. Opp. 8-9. Because the parties are in agreement on this issue, there is no further need to address it.

Congress intended the statute to apply, an approach this Court later endorsed in *United States v. Euge*, 444 U.S. 707, 718 n.14 (1980). Judicial contempt practice prior to the passage of Section 1826 included the power to coercively detain corporate custodians. *See, e.g., Penfield v. SEC*, 330 U.S. 585 (1947); *Boren v. Tucker*, 239 F.2d 767 (9th Cir. 1956); *Fenton v. Walling*, 139 F.2d 608 (9th Cir. 1943). Justice Rehnquist's reasoning thus supports the conclusion that Congress intended the statute to apply to corporate custodians.

Respondents fail in their efforts to disavow the clear conflict between the decision below and decisions by other circuits that properly have construed the words "other information" in Section 1826 broadly to include non-communicative, tangible things – *e.g.*, hair, voice recordings, handwriting samples – that could be used against criminal defendants.[2] *First*, Respondents contend that cases from other circuits are distinguishable because these corporate assets – unlike hair, voice and handwriting samples – possessed no "independent informational value." Opp. 9. But that claimed distinction fails on several grounds, the most obvious of which is that "independent informational value" is *not* a requirement of Section 1826: it is a fiction of Respondents' own creation. This phrase appears nowhere in the statute and Respondents cite no case holding that Section 1826 is limited to items with "independent informational value."

Moreover, Respondents' construction of the statutory phrase "other information" would lead to absurd results because it would deny the protections of Section 1826 to witnesses ordered to produce many kinds of evidence for use in a civil or criminal case. Under Respondents' reading, a witness who violated an order to return, say, a prized stallion that a compatriot was charged with having stolen would not be considered a

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2. *In re Lopreato*, 511 F.2d 1150 (1st Cir. 1975); *In re Grand Jury Proceedings*, 567 F.2d 281 (5th Cir. 1978); *United States v. Mitchell*, 556 F.2d 371, 384 (6th Cir. 1977); *Palmer v. United States*, 530 F.2d 787 (8th Cir. 1976) (per curiam).

recalcitrant witness because, according to Respondents, the horse itself "could not constitute 'information' in any sense of the term." Opp. 9. But the stolen horse is probably one of the *most* important pieces of evidence the witness could provide, perhaps even more than his own testimony. *See* 7 J.H. Wigmore, Evidence § 2129, at 704 (Chadbourn rev. 1978). It is hornbook law that one of the common law "testimonial" obligations or evidentiary duties of witnesses was to provide physical objects – such as a horse, or gold bars – that had evidentiary or informational value. *See id.* Section 1826's use of the words "testify" and "provide other information" codified this duty, which applies "to *every form and material of evidence whatever.*" Wigmore, Evidence § 2193, at 74 (emphasis in original); *see also United States v. Euge*, 444 U.S. 707, 712 nn.5-7 (1980); *Palmer v. United States*, 530 F.2d 787, 789 & n.3 (8th Cir. 1976) (per curiam).

It would be fatuous to conclude that the stolen horse in the example above would not qualify as "other information" in Section 1826 – yet, Respondents' misreading of the statute would compel that very result. The absurdity of Respondents' position is equally manifest here, where the assets that Armstrong was ordered to produce were the *very same items* that he was charged in a parallel criminal proceeding with having allegedly purloined by fraud. The items unquestionably would have provided highly probative evidence and information that would have been used against him. Section 1826 thus applied to them.

Respondents also ignore that Section 1826's language is broad enough to encompass the assets in this case. Consistent with its codification of a broad common-law "testimonial" or evidentiary duty imposed on witnesses, Section 1826 provides that "other information" includes "any book, paper, document, record, recording or *other material.*" 28 U.S.C. § 1826(a) (emphasis added). The Eighth Circuit, quoting from the Recalcitrant Witness Statute's legislative history, correctly emphasized that the "scope [of 'other information' and 'other material'] is intended to be *comprehensive*, including *all*

information given as testimony, but not orally," *Palmer*, 530 F.2d at 789 & n.3 (emphasis added). The "comprehensive" reach of the statutory phrases "other information" and "other material," encapsulating a broad "testimonial" obligation to produce physical things, is a compelling indication that Congress intended the corporate assets in this case to fit within the scope of the statute.

Second, and almost as an afterthought, Respondents claim another distinction between the circuits' decisions and the decision below. Regardless of their possible evidentiary use, Respondents contend that these items were sought *because* they were "objects of monetary value that are the property of the corporation in receivership." Opp. 10.

As a factual matter, this purported distinction is false because even the Government clearly believed that the assets that Armstrong was ordered to relinquish were *evidence* of his alleged criminality, regardless of their corporate nature. The original indictment alleged these assets as fruits and motives of the crime. In a July 2004 superseding indictment, the Government charged Armstrong with money laundering in connection with these assets. The Government also characterized Armstrong's non-production of these items as "direct evidence" of his guilt, and even sought a penalty enhancement for his purported obstruction of justice in failing to surrender them. Pet. 5. Further, seeking the assets as evidence,[3] the Receiver served Armstrong with a subpoena *duces tecum*, the traditional mode of compelling production of information to be used as evidence against a defendant in criminal and civil proceedings.

Armstrong thus stood on a legal footing indistinguishable from that of criminal defendants whom other circuits have held to receive the benefits of Section 1826 after they violated orders

3. The Receiver and joint provisional liquidators for one of corporate defendants executed an agreement, pledging to help the U.S. Attorney's Office, SEC and CFTC by collecting evidence for use in Armstrong's criminal and civil prosecutions. Pet. 3, n.1.

to produce tangible items that could have been used against them. The decision below conflicts with these well-reasoned cases.[4]

Respondents also fail to appreciate that Section 1826, by its terms, is triggered by a refusal to provide "other information" or "other material," regardless of the claimed purpose for which it is sought. To construe Section 1826 otherwise would frustrate the contempt procedure and only invite abuse (as this case amply demonstrates) by countenancing circumvention of the statute's protections simply by claiming that tangible items are sought for purposes other than to gather evidence or information.

In sum, Section 1826's text, case law, and legislative history forestall Respondents' attempts to explain away the undeniable conflict between the decision below and the rulings of other circuits. Review is needed to resolve this circuit split and to clarify the meaning of "other information" in the Recalcitrant Witness Statute.

II. Review Is Needed To Clarify The Scope And Meaning Of The Non-Detention Act.

Respondents' assertion that Congress did not intend Section 4001(a) to limit inherent judicial power to employ coercive confinements, Opp. 11, must fail in the face of Section 4001(a)'s plain language, which this Court has declared proscribes "detention *of any kind* by the United States" absent congressional authorization. *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original). The statute could hardly be clearer that "*No* citizen shall be imprisoned . . . *except* pursuant to an Act of Congress." 18

4. To say the decision below "did not disagree" with the Section 1826 cases by other circuits, Opp. 10, is misleading. In fact, the Second Circuit made no effort at all to explain how its decision was consistent with the decisions by the other circuits, or how the corporate assets in this case could fall outside the scope of the broad, common-law "testimonial" duty that Section 1826 codified.

U.S.C. § 4001(a) (emphasis added). Respondents' claim that Section 4001(a)'s "legislative history" – *i.e.*, a statement by a *single legislator* during the Congressional floor debates – "confirms" that it was not intended to supplant a court's inherent power to jail civil contemnors, Opp. 11 n.2, is refuted by the numerous authorities cited in the Petition. Pet. 14-17, nn. 9-11. Not only is such supposed legislative history an inherently unreliable source of legislative intent, *see* William N. Eskridge, *et al.*, *Legislative and Statutory Interpretation* 304 (2002), but Respondents' contention is also directly contrary to an *amicus* brief filed in *Padilla v. Hanft*, in which the Congressional sponsors of Section 4001(a) reiterated that it was intended to apply to *all* detentions. *See* Brief of *Amici Curiae* Original Congressional Sponsors of 18 U.S.C. § 4001(a) in Support of Petitioner, No. 05-533 (brief filed Dec. 13, 2005) ("Congr. Amici Br."), at 3.

Moreover, Respondents' concern that a literal construction of Section 4001(a)'s plain language would leave courts powerless to use coercive confinement to enforce their orders in situations where Section 1826 does not authorize confinement is overstated.[5] If there are civil contempts to which Section 1826 does not apply (and Respondents identify none), they are few. Moreover, courts still retain inherent authority to employ other coercive measures such as levying fines and sanctions, or shifting attorneys' fees, which provide the judiciary with ample authority to protect the administration of justice. But even if there are narrow classes

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5. Respondents' reliance on *Shillitani v. United States*, 384 U.S. 364 (1966), is misplaced. Opp. 11. Indeed, Congress passed Section 1826 in response to *Shillitani* to supplant its holding that contemnors could be confined indefinitely. *See generally In re Andrews*, 469 F. Supp. 171, 175 (E.D. Mich. 1979). Moreover, *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821), predated Section 1826's enactment, and *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), did not even involve incarcerated contemnors. Opp. 11.

of contempt proceedings outside the scope of Section 1826, resolution of that problem lies with Congress, not in a judicial jettisoning of Section 4001(a)'s unambiguous text.

Respondents argue that the Judiciary Act of 1789, which "implicitly vested" federal courts with inherent power to use coercive incarceration, authorized Armstrong's indefinite confinement because, according to Respondents, Section 4001(a) does not require that a statute "*explicitly* authorize [] detention." Opp. 12. Respondents' argument underscores the need for review to address an important question left open in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004): the specificity of detention language that the Non-Detention Act requires. In *Hamdi*, the Court divided evenly over whether a congressional resolution enacted after September 11 permitting the use military force granted the power to detain a U.S. citizen under Section 4001(a). Four Justices concluded that it "clearly and unmistakably" did, even though it used no specific detention language. Four other members of the Court disagreed, concluding that Section 4001(a) demands that a statute explicitly use the word "detention" or other, similar language, a view shared by the statute's congressional sponsors, Congr. Amici Br. at 3 (detention authority must be "*explicitly* grounded in statute") (emphasis added), and commentators, too, *e.g.*, Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 180, 190 (2004). Review is needed to resolve this important federal question.

In arguing that the criminal contempt statute, 18 U.S.C. § 401(3), provided an alternative grant of authority for Armstrong's indefinite civil confinement, Respondents claim that Section 401(3) uses the term "punish" "only in a generic sense relating to confinement, not in a more specific sense limited to confinement for criminal contempt." Opp. 13. The cases cited by Respondents for this proposition do not support it, however, because they merely assumed – but did not decide

– that Section 401(3) applies to civil contempt, and none addressed whether it authorizes *indefinite* civil detention with the clarity the Non-Detention Act requires. Tellingly, Respondents do not dispute that Section 401(3)'s applicability to civil contempt was left open in *Penfield Co. of Calif. v. SEC*, 330 U.S. 585 (1947), or challenge the persuasive historical and textual evidence cited in the Petition that the word "punish" in Section 401(3) refers only to criminal contempt. Pet. 18-20. Review is needed to clarify that Section 401(3) does not speak to civil contempt and lacks clear statutory language authorizing indefinite confinement for coercive, non-punitive purposes.

III. Due Process Requires That A Claim Of Inability To Comply Must Be Credited After Some Period Of Detention.

Respondents claim that there is no rule that, after some period of confinement that fails to induce compliance, a contemnor's claim of inability to comply must be credited. Opp. 14. While it is true that this Court has not drawn a precise line, it expressly has rejected the Second Circuit's holding below that a contemnor can be held *forever*.[6] Rather, *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948), held that "[h]is denial of possession *is given credit* after demonstration that a period in prison did not produce the goods." (Emphasis added). Following *Maggio*, the lower courts have recognized that past possession of property creates no permanent presumption that a contemnor continues to possess it at a later time; "[t]he presumption, strongest at the beginning, is diminished with the lapse of time, and is *completely dispelled by long delay*." *Wall v. Lowder*, 185 F. Supp. 654, 658

6. Despite Armstrong's urging, the District Court on remand did *not* release him on due process grounds based on the passage of time. Presumably, had the District Court found that Armstrong's confinement remained coercive, it would have continued his detention indefinitely.

(M.D.N.C. 1960) (emphasis added) (presumption ended after ten months). These courts properly imposed a time limit on the permissible length of confinement for civil contempt based on the immutable principle that a presumption of continued possession "grows weaker as time passes, *until it finally ceases to exist.*" *Brune v. Fraidin*, 149 F.2d 325, 327-28 (4th Cir. 1945) (emphasis added) (presumption ended after thirty-six months); *see also Marin v. Ellis*, 15 F.2d 321, 321 (8th Cir. 1926) (presumption expired within twenty-eight months); *In re Walt*, 17 F.2d 588, 593-94 (D. Minn. 1927) (presumption ended after two years).

The Second Circuit's rejection of these due process principles was not a "fact-bound" determination, Opp. 15, but represents a conflict with the holding in *Maggio* and the decisions of other courts cited above. Review is needed to reaffirm that the Due Process Clause limits the ultimate duration of confinement for civil contempt.

As stated in the Petition at Point III(B), the decision below also rejected the law of other circuits that detention is impermissibly punitive when no "substantial likelihood" exists that further detention will induce compliance. Pet. 25-29. At the April 2007 hearing, however, the District Court did not follow the Second Circuit on this point. Instead, it ended Armstrong's confinement, not because of his inability to comply, but because the confinement would have no further coercive effect. In light of the relief eventually granted, Armstrong no longer seeks certiorari on this point.

IV. This Case Is An Ideal Vehicle To Review The Important Questions Presented.

Respondents concede that the Petition is not moot, and argue only that it is not a good vehicle for review because Armstrong is no longer jailed for civil contempt. Opp. 16-17. But that is a distinction without a difference. If this Court

were to agree with the arguments and authorities cited in the Petition, Armstrong could be freed from the criminal sentence he is now serving based on time he already has served in civil contempt. In other words, there is no material difference between Armstrong and an incarcerated civil contemnor: both seek freedom from their current imprisonment. Thus, Armstrong's claims should be considered equally compelling.

Moreover, Respondents ignore the unique and historic nature of this case, which makes it a particularly appropriate vehicle to review the important questions raised herein. Armstrong, after all, was incarcerated for more than seven years, the longest term of civil contempt in the history of the federal courts. The fact that the District Court eventually abandoned the whole enterprise on the grounds that it failed to coerce in the first place only underscores the significance of the constitutional and statutory limitations whose applications are at issue in this case. As this Court held nearly sixty years ago, contempt never must become "a questionable experiment in coercion which will recoil to the discredit of the judicial process if time proves the adjudication to have been improvident and requires the courts to abandon its enforcement." *Maggio*, 333 U.S. at 67. Review is needed to reaffirm these principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: October 3, 2007

Respectfully submitted,

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